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Working Group on the issue of human rights and transnational corporations and other business enterprises

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, submitted pursuant to Human Rights Council resolutions 17/4 and 35/7.

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The report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Summary

In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises takes stock of business and government action to advance the implementation of corporate human rights due diligence as set out in the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. It highlights emerging good practices that should be built upon and scaled up in order to address gaps in current practice.

I. Introduction

A. Background

1. The unanimous endorsement of the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework by the Human Rights Council in 2011 represented a watershed moment in efforts to address adverse impacts on people resulting from business activities in all sectors. They provided for the first time a globally recognized and authoritative framework for the respective duties and responsibilities of Governments and business enterprises to prevent and address such impacts and have since become a common reference point for all stakeholders.

2. The Guiding Principles clarify that business enterprises have an independent responsibility to respect human rights and that in order to do so they are required to exercise human rights due diligence. Human rights due diligence refers to the processes that all business enterprises should undertake to identify, prevent, mitigate and account for how they address potential and actual impacts on human rights caused by or contributed to through their own activities, or directly linked to their operations, products or services by their business relationships.

3. Since 2011, a range of business enterprises have taken steps to implement human rights due diligence, and good practices have been building up. However, considerable efforts by different actors are needed to make human rights due diligence a part of standard business practice.

B. Aims and objectives

4. In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises sets out to highlight: (a) key features of human rights due diligence; (b) current gaps and challenges; (c) emerging good practices; and (d) how key stakeholders — States and the investment community, in particular — can contribute to the scaling-up of effective human rights due diligence.

5. It also seeks to contribute to convergence around the due diligence concept of the Guiding Principles among international efforts to promote corporate responsibility. In that regard, the recent *OECD Due Diligence Guidance for Responsible Business Conduct* of the Organization for Economic Cooperation and Development (OECD) is another important reference.

C. Methodology, scope and limitations

6. In preparing its report, the Working Group benefited from written submissions by interested parties in response to an open call for input; interviews with a number of experts; and consultations with business organizations, civil society organizations, States and other stakeholders convened in Bangkok, Beijing, Buenos Aires, Geneva, London, Paris, Santiago, Washington, D.C. and Zurich.[1]

7. The scope of the report is the human rights due diligence standard set out in the second pillar of the Guiding Principles — the corporate responsibility to respect

[1] The submissions are available at https://www.ohchr.org/EN/Issues/Business/Pages/Submissions2018.aspx. A thematic page can be found at https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx.

human rights.[2] It applies to all business enterprises, regardless of size, sector, operational context, ownership and structure. The report also addresses the role of States, as outlined in the first and third pillars of the Guiding Principles — the State duty to protect human rights and the need to ensure access to remedy for victims.

8. The Working Group recognizes that more work is needed to evaluate the actual impact of emerging practices on the ground. Going forward, it will be essential to monitor the effectiveness of and lessons learned from the approaches described in the present report.

9. The subject of human rights due diligence in practice covers a vast range of issues (as business activities can potentially have an impact on all internationally recognized human rights) and activities (as due diligence involves different steps and processes). The present report merely scratches the surface. Two companion notes have been developed to elaborate on key concepts and lessons learned from business practice.[3]

II. Human rights due diligence: key features and why it matters

A. Key features

10. Human rights due diligence provides the backbone of the day-to-day activities of a business enterprise in translating into practice its responsibility to respect human rights. It is a way for the enterprise to proactively manage the potential and actual risks of adverse impacts on the rights and dignity of people. While often referred to as the human rights due diligence process, in reality it involves a bundle of interrelated processes, which should include the following four core components:[4]

(a) Identifying and assessing actual or potential adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Integrating findings from impact assessments across relevant functions and company processes and taking appropriate action according to its involvement in the impact. More specifically, if the enterprise is causing the impact, it should take steps to cease or prevent it; if it is contributing to the impact, it should take steps to cease or prevent its contribution and use leverage to mitigate the remaining impact; if it has not contributed to the impact, but that impact is directly linked to its operations, products or services by its business relationships, it should take steps to gain and use leverage to prevent and mitigate the impact, to the greatest extent possible;

(c) Tracking the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working;

(d) Communicating on how impacts are being addressed and showing stakeholders — in particular affected stakeholders — that there are adequate policies and processes in place to implement respect for human rights in practice.

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[2] Further explained in *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* of the Office of the United Nations High Commissioner for Human Rights (OHCHR).

[3] For the companion notes (forthcoming), see https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx.

[4] These are elaborated on in Guiding Principles 17 to 21 and in the interpretive guide of OHCHR.

11. The human rights due diligence processes also need to be complemented by (a) appropriate policies setting out the commitment of business enterprises to respect human rights and efforts to embed human rights due diligence across levels and functions; and (b) active engagement in the remediation of adverse human rights impacts caused or contributed to by the enterprise.

12. Where a business enterprise identifies that it has caused or contributed to an adverse impact, a key part of its responsibility is to provide for or cooperate in the remediation of such impacts through legitimate processes, which may involve State-based judicial and non-judicial mechanisms, as well as non-State-based grievance mechanisms. Business enterprises should establish or participate in effective operational-level grievance mechanisms, which should meet certain core criteria set out in Guiding Principle 31. Such mechanisms are critical to effective due diligence, reinforcing prevention by helping an enterprise to identify concerns and systemic problems and address grievances at an early stage, thereby preventing grievances from escalating.

13. Descriptive characteristics of human rights due diligence include that it should:

(a) Be undertaken first and foremost to prevent adverse human rights impacts;

(b) Be commensurate with the severity and likelihood of the adverse impact (the higher the likelihood and severity of an adverse impact, the more extensive the due diligence should be) and be tailored to specific risks and how they affect different groups (such as applying a gender lens or taking into account how actual or potential adverse impacts may differ for or may be specific to women) and adjusting actions accordingly;

(c) Be ongoing, in recognition of the fact that the risks to human rights may change over time as operations and operating contexts evolve.

14. Other key considerations include the need to ensure that the due diligence process:[5]

(a) Is not carried out or required as a way to shift responsibilities — the expectation that all business enterprises carry out human rights due diligence does not shift responsibilities from Governments to enterprises, or from the enterprises causing or contributing to adverse impacts to the enterprises that are directly linked to adverse impacts through their business relationships;

(b) Is conducted in accordance with the principles of internationally recognized human rights, which may help enterprises to honour international human rights standards when national legal requirements fall below such standards;

(c) Is proportionate to the size of the enterprise, the risk of the severe impacts and the nature and context of the business operations, for example, in high-risk operating environments, such as conflict-affected areas, business enterprises need to exercise heightened human rights due diligence;

(d) Is adapted to the challenges of managing business relationships, for example with suppliers, join-venture partners or government entities, and takes into account a range of possible measures — both unilateral and collective — for enhancing leverage to address the adverse impacts directly linked to the enterprise's operations, products or services by its business relationships;

(e) Is informed by meaningful stakeholder engagement throughout the process, in particular with affected stakeholders;

[5] These characteristics correspond with "the essentials" included in the *OECD Due Diligence Guidance for Responsible Business Conduct*, pp. 16–19.

(f) Involves ongoing communication on identified potential and actual impacts and how they are being addressed, reflecting the nature of the impacts and being accessible to its intended audiences, while not posing risks to affected stakeholders, personnel or the legitimate requirements of commercial confidentiality.

15. Further key considerations for each of the main components of the due diligence process are outlined in companion note I[4] to the present report, as well as how due diligence is being interpreted for specific sectors and types of actors. The connection with concepts of legal liability is also addressed,[6] as human rights due diligence, when done properly, is increasingly relevant for strengthening legal risk management. One key difference between human rights due diligence and traditional corporate due diligence — typically transactional due diligence or compliance monitoring — is that the former emphasizes risks to people whereas the latter addresses risks that are a concern for business.

B. Why it matters

16. The essence of the Guiding Principles is the distinction made between the State duty to protect and the business responsibility to respect human rights. Due diligence is the primary expectation of behaviour for any business with respect to its responsibilities concerning the adverse impacts on human rights that it causes, contributes to or to which it is directly linked.

17. Due diligence is therefore fundamental as a way of informing what any business enterprise should do to meet its responsibility to respect human rights. It goes well beyond the idea of doing no harm. The concept of corporate respect, as set forth in the Guiding Principles, requires proactive steps to prevent and address harmful impacts. The prevention of adverse impacts on people is the main purpose of human rights due diligence.

18. In a wider context, if human rights and dignity are not upheld in business activities, the positive contributions that businesses may otherwise make towards sustainable development will be undermined. The Working Group and others have emphasized this connection and argued that the most significant contribution most business enterprises can make towards sustainable development is to prevent and address adverse impacts on human rights through effective human rights due diligence.[7]

19. The responsibility to carry out human rights due diligence applies regardless of any "business case" argument. Failure to conduct adequate diligence on risks to people will often have not only a human cost, but may also come back to haunt the business.[8]

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[6] Based on a report by OHCHR (A/HRC/38/20/Add.2).

[7] See https://www.ohchr.org/EN/Issues/Business/Pages/SustainableDevelopmentGoals.aspx, https://www.business-humanrights.org/en/civil-society-urges-businesses-govts-to-put-human-rights-at-core-of-implementation-of-un-sustainable-development-goals#c162595 and https://www.shiftproject.org/resources/viewpoints/sustainable-development-goals-corporate-respect-human-rights/.

[8] See, for example, Rachel Davis and Daniel Franks, *Costs of Company-Community Conflict in the Extractive Sector*, Corporate Social Responsibility Initiative Report No. 66 (Cambridge, Massachusetts, Harvard Kennedy School, 2014).

III. Current trends and challenges

A. Increasing uptake in policy frameworks

20. Since the endorsement of the Guiding Principles by the Human Rights Council in 2011, corporate human rights due diligence has become a norm of expected conduct. The concept was fully integrated into the OECD Guidelines for Multinational Enterprises. The recent *OECD Due Diligence Guidance for Responsible Business Conduct*, endorsed by all 48 adhering Governments, will provide further impetus to solidifying the norm. It was incorporated into the revised Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, of the International Labour Organization, and has been reiterated by leaders at the Group of Seven and Group of 20 summits. It is also reflected in general human rights due diligence legislation (France, European Union) or emerging legislation (Switzerland), as well as in requirements for mandatory disclosure of risks of modern slavery in supply chains (in the United Kingdom of Great Britain and Northern Ireland, in the United States of America (California) and, forthcoming, in Australia) — legal developments which have been characterized as "the beginning of a paradigm shift".[9]

21. Policy frameworks in emerging markets have also been inspired by the human rights due diligence concept of the Guiding Principles, such as in China and Indonesia. In the 20 national action plans on business and human rights that have been issued to date, Governments have reaffirmed the expectation that business enterprises in their territories or jurisdictions exercise human rights due diligence.[10]

22. Besides Governments, a growing number of investors are asking business enterprises how they manage their risks to human rights.[11] Also, among business lawyers there is a growing recognition that they should advise corporate clients to exercise human rights due diligence. The International Bar Association (IBA) notes that "businesses are increasingly expecting their preferred external counsel to act as partners in the identification or management of human rights risks".[12] In the world of sports, human rights due diligence processes have become an integral part of the selection process for future world cups of the Fédération Internationale de Football Association (FIFA)[13] and for host-city contract operational requirements of the Olympic Games.[14]

23. Among business enterprises, a small but growing number of large corporations in different sectors have issued policy statements expressing their commitment to respect human rights in line with the Guiding Principles. Several such enterprises are developing practices that involve ongoing learning and innovation around the various

[9] Amnesty International and Business and Human Rights Resource Centre, *Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse*.

[10] See the Working Group's compilation of such references, https://www.ohchr.org/Documents/Issues/Business/Session18/CompilationNAPReferencesToDi%20ligence.pdf.

[11] See the submission by the Investor Alliance for Human Rights, https://www.ohchr.org/Documents/Issues/Business/WGSubmissions/2018/InvestorAlliance.pdf. An example of the expectations of institutional investors is the document on human rights expectations of Norges Bank Investment Management, which manages the pension fund of the Government of Norway, https://www.nbim.no/en/responsibility/risk-management/human-rights/.

[12] International Bar Association, "IBA practical guide on business and human rights for business lawyers".

[13] FIFA Human Rights Advisory Board, "Update statement from the FIFA Human Rights Advisory Board", May 2018.

[14] See https://www.olympic.org/news/ioc-reinforces-its-commitment-to-transparency-and-reform-by-publishing-host-city-contract.

components of human rights due diligence to prevent and address impacts across operations and relationships, including in supply chains.[15]

B. Gaps and challenges in current practice

24. While the global diffusion of human rights due diligence as a norm of conduct in various policy frameworks is notable, much remains to be done to translate the norm into actual practice. One of the challenges to making robust assessments of progress is that comprehensive and systematic data on how the majority of the world's business enterprises understand and manage their actual and potential adverse impacts on human rights remain scarce. Input provided to the Working Group by experts from different backgrounds in preparation for the present report, as well as findings from several recent human rights benchmarks and assessments[16] nevertheless shed light on the current situation. Different types of gaps and challenges emerge, both with regard to business and State practice as well as the wider environment.

1. Business practice

25. According to human rights benchmarking and rating assessments, the majority of companies covered by the assessments do not demonstrate practices that meet the requirements set by the Guiding Principles. This may indicate that risks to workers and communities are not being managed adequately in spite of growing awareness and commitments. One of the indicators is the lack of focus on human rights risks in most current reporting, which is at best a result of inadequate communication or at worst a reflection of insufficient understanding and management of risks to human rights. In general, there is much room for improvement regarding transparency on the concrete details of risk assessments and human rights due diligence processes. Often human rights due diligence is not understood properly, resulting in:

(a) Misconstruction of risk, namely, when companies operate with a mindset of risk to the business and not risk to rights holders, such as workers, communities and consumers. Related to that, there is a lack of understanding on how better human rights due diligence will also improve the overall risk management approach. Reluctance or even pushback from traditionally oriented legal counsel, both in-house and external, fearing disclosure is a key obstacle to uptake by companies;

(b) Failure to address the most significant risks to human rights first and focusing instead on risks that may be relatively easy to address or that are getting attention in a given context, such as modern slavery or diversity, rather than doing an objective assessment of the most significant and likely risks to people affected by the activities and business relationships of the enterprise;

(c) Too many human rights impact assessments done as exercises to tick the box, without meaningful engagement with stakeholders, including engagement with vulnerable or at-risk groups and critical voices such as human rights defenders;

(d) Most business enterprises still being mostly reactive, instead of proactively trying to identify potential human rights impacts before they arise,

[15] See Norton Rose Fulbright and British Institute of International and Comparative Law, *Making Sense of Managing Human Rights Issues in Supply Chains: 2018 Report and Analysis*.

[16] See Corporate Human Rights Benchmark; Guiding Principles Reporting Framework database; KnowtheChain; Ranking Digital Rights; Responsible Mining Index; and assessments in 2018 by Vigeo Eiris, the Sustainability Yearbook 2018 by RobecoSAM and the Principles for Responsible Investment. See companion note II for more details. There is also a growing academic literature on corporate human rights due diligence. See, for example, the *Business and Human Rights Journal* and the *European Journal of International Law*.

including through early-stage meaningful engagement with potentially affected stakeholders.

26. Performance seems to be particularly weak on the "taking action" and "tracking of responses" components of human rights due diligence set out in the Guiding Principles. Similarly, connections between human rights due diligence and the remediation of actual impacts are not being made in practice. The inadequate integration of a gender lens is a notable gap.[17]

27. A common observation is that beyond the small group of early adopters — mostly large corporations based mainly, but not exclusively, in some Western markets — there is a general lack of knowledge and understanding of the corporate responsibility to respect human rights, especially among smaller companies. In addition, the experience gained from national-level dialogues indicates that many business enterprises, in particular small and medium-sized enterprises, view due diligence expectations as a burden.

28. Translating corporate policies into local contexts, for example in subsidiaries, is a challenge across sectors. There is typically a disconnect between the corporate level and implementation on the ground as well as gaps in internal alignment between functions and incentive structures. An observation in this regard is that companies are prioritizing general training, so that they can "tick the box" on human rights training, without tailoring those trainings to specific functions.

29. An apparent gap in current supply chain management is that human rights due diligence tends to be limited to tier-one companies. Efforts to go beyond tier one tend to happen only when the issue has been brought to light by the media or non-governmental organizations (NGOs). Few companies appear to be asking tier-one suppliers to demonstrate that they — and their suppliers in the tiers below — fulfil the responsibility to respect human rights by requiring assessments of the risks to and impacts on human rights. Practices in place before the creation of the Guiding Principles are still common, for example, situations in which companies typically ask suppliers to meet predefined performance criteria in relation to a limited set of human rights, mostly labour rights. However, there have been some positive developments in terms of:

(a) More meaningful collaborative approaches to joint leveraging efforts;

(b) Efforts to trace impacts beyond tier one, such as in mineral supply chains,[18] mostly through industry or multi-stakeholder platforms.

30. In the context of the sustainable development agenda, there is a risk that corporate engagement on the Sustainable Development Goals is being conflated with human rights due diligence. Overemphasis on business opportunities overshadows the understanding that the most significant contribution the majority of business enterprises can make to realizing the Goals is to respect human rights.

2. Government practice

31. A lack of government leadership in addressing governance gaps remains the biggest challenge. A fundamental issue is that host Governments are not fulfilling their duty to protect human rights, either failing to pass legislation that meets international human rights and labour standards, passing legislation that is inconsistent or failing to enforce legislation that would protect workers and affected

[17] Two broad exceptions appear to be: (a) when a business enterprise faces a risk of being linked to sexual violence or harassment, it reacts and tries to adopt a gender lens; (b) gender is being used as part of inclusiveness and diversity, for example, in the workforce or on boards.

[18] See http://mneguidelines.oecd.org/mining.htm.

communities. A case in point is the situation for the rights of workers[19] as well as the limited capacity and effectiveness of labour inspection authorities in many parts of the world.

32. While some home Governments have introduced due diligence or disclosure legislation, such efforts also remain patchy. Related to that, even as civil society organizations and many business enterprises welcome legislation requiring disclosure on modern slavery and risks to human rights, there is a lack of harmonization and coordination between Governments pursuing this agenda.

33. Business and civil society experts alike also note that Governments are not providing enough guidance on human rights due diligence and support tailored to national business audiences, including small and medium-sized enterprises.

34. A lack of policy coherence in government practice is part of the overall picture, and Governments are not leading by example in their own roles as economic actors. This limits their capacity to push business enterprises to put human rights due diligence into practice. The Working Group has highlighted that State-owned enterprises — which are expected to lead by example — are generally lagging behind in adopting human rights due diligence approaches.[20] Similarly, there is generally weak integration of human rights due diligence into the practice and client requirements of export credit agencies, as highlighted by the Working Group in a recent report,[21] and public procurers.[22]

3. Systemic issues and market failures

35. A number of the risks to human rights in which business enterprises may be involved include child labour, forced labour, discrimination against women, minorities, migrants and others in the workplace and community, lack of living wages, lack of participation of affected workers, community members and indigenous peoples, forced resettlements or lack of access to remedy. These risks concern systemic issues and are in many contexts linked to root causes or fundamental development issues, such as poverty, corruption and weak rule of law. They represent challenges that individual business enterprises cannot solve on their own.

36. Other challenges for expanding the uptake of human rights due diligence by businesses may be categorized as market failure issues, such as:

(a) The "first-mover challenge", in which business enterprises that are transparent about risks and challenges are criticized for not doing enough whereas less responsible competitors go below the radar of NGOs and journalists. In some cases, NGOs and journalists expect too much of companies that are "merely" linked to the human rights abuse as opposed to the enterprise or government agency that is causing the abuse;

(b) Lack of available expertise on the Guiding Principles among the majority of consultancy firms advising on "corporate social responsibility" and lack of integration of business and human rights into the core advisory services of corporate law firms;

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[19] See, for example, the Global Rights Index of the International Trade Union Confederation.

[20] See the Working Group report A/HRC/32/45, of which a summary is available at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/ExSummary-WGBHR-SOE_report-HRC32.pdf.

[21] See A/HRC/38/48, of which a summary is available at https://www.ohchr.org/Documents/Issues/Business/ExecutiveSummaryReportEconomicDiplomacy.pdf.

[22] See Claire Methven O'Brien, Amol Mehra and Nicole Vander Meulen, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions* (International Learning Lab on Public Procurement and Human Rights, 2016).

(c) Insufficient incentive structures for addressing impacts on people as there is currently a lack of systematic mechanisms for investors, public agencies interacting with the private sector and regulators to reward good practices. While Governments and investors are increasingly putting a price on environmental impacts, they are lagging behind in implementing similar approaches for impacts on people;

(d) Lack of common understanding about which metrics and indicators to use to track and evaluate performance, both within companies and by other stakeholders, such as investors. The consequences may be that companies gather and publish information that gives "little insight into how their business actually affects the basic dignity and welfare of people. And markets are left rewarding often poor or inadequate behaviors, while leading practice can go unrecognized and under-supported".[23]

IV. Going forward: building on good practices and addressing market and governance failures

A. Lessons learned for businesses: road maps exist for getting started

37. A key lesson from assessments such as the Corporate Human Rights Benchmark and analysis available from the Guiding Principles Reporting Framework database[24] is that in spite of slow progress overall, effective due diligence can be done in practice. There are a number of concrete examples that may provide a starting point for a wider group of companies. This, together with the development of numerous tools and resources for businesses in recent years, means that business enterprises can no longer cite a lack of knowledge as an excuse for not getting started with human rights due diligence.

38. In carrying out its research for the current report, the Working Group sought to tap into the experiences of early adopters and unpack aspects of the process in order to develop a human rights due diligence approach, including on how to get started, the journey of implementing the process and key milestones. The findings are presented in companion note II.[4]

39. While the human rights due diligence process of an individual business enterprise needs to be tailored to its particular situation and risk profile, depending on sector, operating contexts and business model, successful strategies for getting started look surprisingly similar across sectors. Experience has shown that when there is a commitment from top executives and integration across corporate functions, change is possible. Organizational change takes time, however, and involves processes of continuous improvement and learning by doing.

40. Even among early adopters of human rights due diligence across the enterprise, it is acknowledged that the journey is ongoing. When working with subsidiaries in assessing impacts, or when working with suppliers or in other business relationships — especially when many tiers are involved and when working in complex environments — progress may be slow. However, committed engagement over time pays off in terms of better prevention and trust among stakeholders.

41. Business lawyers — both in-house counsel and external firms — have a unique position for shaping the path an enterprise may take. Often, they are seen as one of

[23] Caroline Rees, "The way businesses' social performance gets measured isn't working", Shift, February 2018.

[24] Supported by a coalition of 87 investors representing $5.3 trillion in assets under management. See https://www.ungpreporting.org/.

the main obstacles to adopting effective human rights due diligence, with a traditional narrow focus on legal risk. However, some bar associations, large law firms and in-house counsel endorse the Guiding Principles and acknowledge that human rights due diligence should be a core part of the advice provided by a wise counsellor. The need for such a change in mindset among mainstream business lawyers is elaborated in companion note II.[4]

B. Good practices

42. Human rights due diligence is an art more than a science, as it needs to be tailored to the particular situation of a business enterprise. Yet, it can be put into practice, as emerging approaches clearly demonstrate.

43. The fundamental change that needs to happen is for a business enterprise to integrate into its operations a human rights lens that takes into account potential and actual adverse impacts on people, with a view to preventing and addressing such impacts. This needs to be done with due consideration to all the different components of the human rights due diligence process (assessing impacts, integrating and acting upon findings, tracking effectiveness of responses, communicating on how impacts are addressed) and remediation efforts.

44. Cross-cutting aspects of good practice identified by the Working Group are compiled in companion note II[4] and summarized below.

1. Stakeholder engagement

45. While there are big gaps in current practice, a number of aspects of good practice are increasingly becoming better understood. Key aspects include:

(a) *Engaging with and enabling critical voices to raise concerns about potential and actual impacts*. Engaging constructively and in good faith with critical voices, such as human rights defenders, trade union representatives and community members, helps to identify the risks to human rights. Business enterprises also need to consider, as part of their human rights due diligence, the risks that such critical voices may face.[25] The Guiding Principles provide a framework for mutual constructive engagement;

(b) *Engaging directly with affected stakeholders in good faith*. Sometimes engaging with stakeholders on the ground may not be possible owing to security concerns and practical barriers, in which case credible NGOs can be useful proxies. However, consulting directly with affected workers and communities provides the best way to identify concerns and bring forward adequate actions and can help to strengthen preventive, mitigation and remediation efforts. A critical aspect is the need to take into account the specific risks affecting different groups, including integrating gender-sensitive approaches.[26] Operational-level grievance mechanisms that meet the effectiveness criteria of the Guiding Principles provide a key measure for engaging directly with affected individuals and reinforcing prevention. Support for community-based human rights impact assessments can strengthen engagement and build trust;

(c) *Collaborating with NGOs and unions in formal partnerships to identify and address potential and actual impacts*. Entering into partnerships with independent and critical organizations can help to strengthen processes to identify

[25] The Working Group is developing guidance on the implications of the Guiding Principles for engaging and safeguarding the rights of human rights defenders. See https://www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx.

[26] See the work of the Working Group on gender and the Guiding Principles, https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx.

and address human rights impacts. Successful models that should be used more widely include collaboration between food and beverage companies and NGOs, worker-driven partnerships[27] and global framework agreements between international trade unions and business enterprises.[28]

2. Transparency and meaningful reporting

46. Disclosure on human rights due diligence is an area in which there is a significant gap between leading practice and the large majority of businesses. Reluctance to disclose information about human rights risks and mitigation efforts seems to be due in large part to perceived legal risks. However, good practices are emerging, spurred by benchmarking initiatives, investor pressure, legal developments and a wider trend towards transparency in corporate responsibility.

47. Core aspects of good practice include:

(a) *Clear recognition of what the risks to people are*. When conducting stand-alone human rights impact assessments for particular projects or operations or in high-risk contexts, making them publicly available is a good practice;[29]

(b) *Accurate descriptions of the due diligence processes that the business enterprise has in place to address specific risks*. Indicators of good practice may be the number of affiliates that conduct regular human rights impact assessments; the percentage of tier-one businesses that have committed to implementing the Guiding Principles and require the same from enterprises with which they have business relationships; the monitoring of identified risks to human rights, which may include auditing, especially when identifying the risks of severe impacts; clear statements on how business enterprises understand their responsibility, as opposed to trying to shift responsibilities; and evidence that resources are being spent on identifying and fixing problems.

3. Beyond tier one

48. Managing the risks to and impacts on human rights in supply chains can be extremely complex. Supply chains can involve hundreds or thousands of suppliers and several tiers, with suppliers typically providing services to more than one sector. Yet, the Guiding Principles clarify that the responsibility of a business enterprise to respect human rights relates to the adverse human rights impacts to which its operations, products and services are linked in all tiers of its value chain. Moreover, each business enterprise should ensure that its own practices, for example, selling defective parts or unhealthy ingredients, irresponsible purchasing practices, or low-cost, fast-delivery business models, do not contribute to adverse human rights impacts caused by entities in the value chain.

49. One approach for going beyond tier one involves "cascading" requirements down to the suppliers of suppliers, and can be most effective when pursued using incentives, with constructive engagement and support for aspects such as:

- Risk assessments
- Audits
- Training and capacity-building
- Establishment of grievance mechanisms

[27] See, for example, http://www.fairfoodprogram.org/.

[28] See http://www.industriall-union.org/issues/pages/global-framework-agreements-gfa.

[29] Companion note II contains a list of available human rights impact assessments.

50. Large enterprises may be able to do so on their own, but collective approaches are more cost effective, especially for business enterprises in the same industry, where they often have the same suppliers.[30] A critical aspect is to ensure that the cascading is not done as a way to shift or limit responsibility, for example by shifting the responsibility to auditors.

51. Going beyond tier one may also involve identifying choke points or control points in the supply chains and assessing how well they are doing due diligence upstream, for example, smelters buying minerals or cotton traders buying cotton bales.

52. New technology also offers the promise of innovative solutions for improving the way human rights impacts are tracked down the supply chain. Significant innovations involve technology to enable workers' voices to be heard, which can enhance both due diligence and remediation approaches, including in supply chains. Collaborative initiatives are also being explored in several sectors to use blockchain technology to monitor impacts at all nodes in the supply chain. At the same time, when using technology, due consideration needs to be given to the risks of undermining good practice.

4. Building and exercising leverage

53. As part of applying due diligence throughout the value chain, business enterprises should convey an expectation that impacts will be prevented and addressed through human rights due diligence wherever relevant across business relationships. This can include requiring or setting incentives for immediate or tier-one business partners to carry out human rights due diligence and to cascade it through their own supply chains. Things go wrong even when good systems are in place, however. Gaining and seeking to exercise leverage becomes fundamental to human rights due diligence good practice when a company identifies adverse human rights impacts which are linked to its operations, products or services and caused by an entity with which it has a business relationship, for example, subsidiaries, suppliers, buyers, distributors, Governments or joint-venture partners.

54. Building and exercising leverage in business relationships to end and mitigate human rights abuse presents a range of practical dilemmas. Experiences suggest that leverage can be exercised in several different ways, both through traditional commercial levers, such as contracts, and through unilateral or collective engagement. The possibility of disengagement is a key aspect. The Guiding Principles clarify that ultimately a business relationship may have to be terminated if efforts to exercise leverage aimed at addressing an adverse human rights impact prove unsuccessful. Emerging practice suggests that it is most effective to be clear about the possibility of disengagement upfront when entering into new business relationships should adverse human rights impacts be identified and unaddressed. As with other business decisions, exercising human rights due diligence on potential disengagement is another critical aspect of good practice.[31]

5. Addressing systemic issues

55. Business enterprises are not expected to solve every development problem that they encounter. That would neither be reasonable nor possible, and is not what is implied in the Guiding Principles. However, business enterprises need to demonstrate that they exercise due diligence to address potential and actual impacts linked to their operations to the maximum of their ability.

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[30] See, for example, http://www.responsiblebusiness.org/.

[31] See https://www.somo.nl/should-i-stay-or-should-i-go-2/.

56. Mitigating human rights impacts in complex contexts typically involves a need to look at root causes. Some business platforms suggest that addressing root causes is the next frontier for business, and that it often requires businesses to work together. Building collective leverage is the rationale behind a range of industry and multi-stakeholder initiatives oriented to business-related human rights impacts. The question about how effective multi-stakeholder initiatives have been in practice is a recurring theme,[32] however, and in general there is a need to strengthen alignment with the Guiding Principles, accountability and grievance mechanisms.

57. Participation in such initiatives can constitute part of the human rights due diligence approach, but it does not change the responsibility of an enterprise when it is causing or contributing to adverse impacts. Moreover, for such participation to constitute part of the due diligence approach, it should be used as a way to gain leverage for addressing adverse impacts.

58. Noteworthy examples involving collaboration and partnerships between stakeholders that address specific and complex issues in supply chains and include accountability mechanisms in their design are the Accord on Fire and Building Safety in Bangladesh, established to create safe working conditions in the country's garment sector, and initiatives to achieve living wages for workers in various sectors, for example, the Action, Collaboration, Transformation (ACT) initiative[33] and Malawi Tea 2020.[34] Other partnerships that address systemic issues include initiatives to achieve responsible recruitment of migrant workers,[35] access to remedy for victims of forced labour,[36] protection and support for human rights defenders through multi-stakeholder collaboration[37] and responsible mineral sourcing that involves investor engagement.

6. Using human rights due diligence as an entry point for contributing to the Sustainable Development Goals

59. Business strategies to contribute to the Sustainable Development Goals are no substitute for human rights due diligence. On the contrary, robust human rights due diligence enables and contributes to sustainable development. For businesses, the most powerful contribution to sustainable development is to embed respect for human rights in their activities and across their value chains, addressing harm done to people and focusing on the potential and actual impacts — as opposed to starting at the other end, where there are the greatest opportunities for positive contribution.[38] In other words, businesses need to realize and accept that not having negative impacts is a minimum expectation and a positive contribution to the Goals.

60. Some business leaders and investors are recognizing that connection, and several case studies are under way on how human rights due diligence by business

[32] Institute for Multi-stakeholder Initiative (MSI) Integrity and the Duke Human Rights Center at the Kenan Institute for Ethics, "The new regulators? Assessing the landscape of multi-stakeholder initiatives: findings from a database of transnational standard-setting multi-stakeholder initiatives", June 2017.

[33] See https://actonlivingwages.com/.

[34] See http://www.malawitea2020.com/.

[35] See, for example, https://www.ihrb.org/employerpays/leadership-group-for-responsible-recruitment.

[36] See https://www.issarainstitute.org/.

[37] See https://www.creer-ihrb.org/lideresydefensores.

[38] See the 10 key recommendations of the Working Group on the connection between the Guiding Principles and the Goals, https://www.ohchr.org/Documents/Issues/Business/Session18/InfoNoteWGBHR_SDGRecommendations.pdf. See also https://www.business-humanrights.org/en/civil-society-urges-businesses-govts-to-put-human-rights-at-core-of-implementation-of-un-sustainable-development-goals#c162595.

enterprises is contributing to the Goals.[39] This provides a good starting point going forward.

C. Addressing market and governance failures

61. In the consultations conducted for the present report, government and investor pressure were highlighted as the two strongest drivers of corporate human rights due diligence; for some, another driver was entanglement in human rights crises.

62. Legislation, economic incentives and State leadership, for example, through procurement, economic support and the work of State-owned enterprises, were highlighted as drivers coming from government action. These levers need to be reinforced in order to reach a tipping point in the uptake by mainstream businesses and to address the market and governance failures highlighted in the present report. Legislation and adequate enforcement, in line with international standards, would also contribute to creating a level playing field and implementing good governance overall.

1. Government action

63. It is the job of Governments to address governance gaps and market failures. As clarified in the Guiding Principles, the international human rights obligations of States include a duty to protect people against human rights abuse by business enterprises. States have a range of levers that they can and should use: policy tools and frameworks, legislation, regulation and adjudication, as well as various economic incentives, provision of guidance and promotion of multi-stakeholder dialogue.

64. A key aspect of fulfilling that duty is to use available regulatory levers. Recent developments show that action is possible.

Strengthening implementation of the duty to protect human rights

65. Addressing gaps in how host States fulfil their duty to protect human rights is a fundamental issue for addressing business-related human rights abuse. The implementation of international human rights standards — including standards of the International Labour Organization — through consistent legislation and enforcement is critical. The lack of capacity and effective institutions is a major issue that needs to be addressed, including through international support. However, a lot can be achieved if there is political will to address practices that are harming people and undermining sustainable development. Examples of positive regulatory and policy developments include:[40]

(a) Programme of the Democratic Republic of the Congo on supply chain transparency for minerals originating from artisanal mining;[41]

(b) Ministerial Regulation No. 2/2017 of Indonesia, which created a certification mechanism to ensure that the fishing industry was free from human rights violations;[42]

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[39] See, for example, www.shiftproject.org/sdgs.

[40] Another example concerns the "dirty list" introduced by Brazil that disclosed companies caught using slave labour in their supply chains and banned them from government contracts and services. Enforcement in recent years has been hampered, however, and should be reinvigorated. See the country visit report of the Working Group, A/HRC/32/45/Add.1.

[41] See https://www.radiookapi.net/2017/06/20/actualite/economie/la-rdc-lance-son-initiative-pour-la-tracabilite-de-lor-artisanal-itoa.

[42] See https://www.business-humanrights.org/sites/default/files/documents/FIHRRST-Jan-2017.pdf.

(c) Backing by the Government of China of industry-focused initiatives to promote due diligence in supply chains, for example in information and communications technology, aviation, mineral sourcing, natural rubber sourcing and the textile and apparel sector.[43]

66. Such developments should be more widely pursued. They should also be mapped more systematically and lessons learned should be shared widely.

Creating due diligence incentives through legislation

67. Laws help to set clear expectations for businesses, and recent legal developments are contributing to the integration of corporate human rights due diligence expectations into national laws.[44] The most notable development is the law introduced in France in 2017 which imposes on French business enterprises above a certain size a duty to be vigilant in order to prevent environmental and human rights harm caused by their subsidiaries and through their business relationships.[45] The first of its kind, it requires enterprises across sectors to develop and implement a vigilance plan and account for how they identify, prevent and address human rights impacts in their global operations. Despite limitations, including the limited number of enterprises covered by the law, it is a welcome development that other Governments should learn from. A legal initiative on mandatory human rights due diligence in Switzerland is currently also being considered by the Swiss Parliament. If adopted, it would be another positive development.

68. Recent regulations in the European Union also include provisions for creating incentives to exercise human rights due diligence, namely:

(a) Directive on disclosure of non-financial information by certain large business enterprises in the European Union, requiring the enterprises covered to report publicly on their policies, due diligence procedures, principal risks and management of those risks, including risks to human rights;

(b) Mandatory due diligence for European Union importers of raw minerals and metals, requiring the exercise of human rights due diligence in line with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Enforcement is left to the European Union member States to carry out.

69. The Government of Germany is taking an interesting approach that involves the possibility of legislation if businesses do not take steps to meet the expectations set forth in the Guiding Principles. In its national action plan, it committed to considering mandatory requirements if at least 50 per cent of German business enterprises with more than 500 employees failed to put policies and processes in place to conduct human rights due diligence by 2020.

70. There have also been some important legal developments with regard to addressing the specific challenge of forced labour and trafficking as well as child labour in business activities and supply chains, namely:[46]

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[43] These initiatives were discussed at the 2017 Forum on Business and Human Rights (A/HRC/38/49). See also, for example, the "Chinese due diligence guidelines for responsible mineral supply chains" and the initiative concerning apparel supply chains, http://mneguidelines.oecd.org/cntac-oecd-partner-to-strengthen-cooperation-textile-apparel-supply-chains.htm.

[44] One platform monitoring such developments is the Business and Human Rights in Law website, http://www.bhrinlaw.org/.

[45] Available at https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte.

[46] A different legal tool is provided by the United States Trade Facilitation and Trade Enforcement Act of 2015, which allows customs authorities to restrict the import of goods produced using forced labour.

(a) The Modern Slavery Act 2015 of the United Kingdom, which requires business enterprises that conduct business in the country and have an annual turnover of £36 million or more to report on steps taken to ensure that there is no forced labour and trafficking in their supply chains and their own activities. In spite of important limitations, including a lack of sanctions, failure to connect compliance with the law with awarding of public procurement contracting and the lack of a central registry, the law is part of overall positive developments;

(b) The California Transparency in Supply Chains Act of 2010, which requires affected business enterprises conducting business in California to report to the public on their efforts to "eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale";

(c) The child labour due diligence law of the Netherlands (pending senate approval and expected to enter into force in 2020), which requires companies to determine whether child labour exists in their supply chains and set out a plan of action on how to combat it.

71. A modern slavery act was expected to be passed in Australia by the federal parliament in the second half of 2018. Among the features of the proposed law tabled by the Government were mandatory requirements for enterprises of a certain size to report on how they manage modern slavery risks in their operations and supply chains, and a proposal that the Government lead by example by publishing an annual consolidated statement covering Commonwealth procurement. A similar bill was passed in the State of New South Wales in June 2018.

72. While it is too early to assess the impacts on the ground of the legal developments addressed above, two effects in particular can be highlighted:

(a) Legislation is helping to raise awareness of the corporate responsibility to respect human rights at the decision-making level within business enterprises. With the explicit requirement that board members need to validate such responsibilities, human rights due diligence has been elevated on the agenda of boards of directors and the executive as well as among critical functions such as legal departments;

(b) While the existing legislation applies only directly to larger companies, obligations are being cascaded down value chains through business-to-business pressure. Anecdotal evidence suggests that those developments make it easier for business enterprises covered by the laws to raise the need for human rights due diligence in partnerships with government entities, such as in joint ventures and with State-owned enterprises.

73. The most important element when considering legislation on human rights due diligence or disclosure is to build on the Guiding Principles and minimize any differences. Other elements to consider when exploring such legislation include how to promote:

(a) Meaningful disclosure by creating incentives to provide information about processes for managing and addressing actual and potential impacts on workers and communities;[47]

(b) Processes for enabling transparency and follow-up on disclosed information;

[47] For a discussion of the outstanding challenges related to mandatory disclosure, see the report of Amnesty International and the Business and Human Rights Resource Centre, *Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse*.

(c) Robust human rights due diligence as opposed to "tick box" approaches, as prevention and implementation must be the end goal;

(d) Coverage of public procurement, given the scale of supply chains involving the Government in any given country;

(e) The right balance between confidentiality issues (with regard to legitimate commercial considerations and stakeholder security concerns) and the need for greater transparency, disclosing sufficient information to fulfil the corporate responsibility to respect human rights;

(f) Carefully targeted use of strict liability concepts which make appropriate use of evidence of adequate due diligence as possible legal defence to encourage robust human rights due diligence processes (see A/HRC/38/20/Add.2).

74. Targeted measures to address specific human rights challenges such as forced labour in supply chains may be necessary. At the same time, both Governments and business enterprises need to make sure that a focus on one particular challenge is not done at the cost of other significant issues. Smart and effective legislation[48] needs to be mindful of potential risks, such as:

(a) Not only covering the largest corporations, since the responsibility to respect applies to business enterprises of all sizes and since both large and small enterprises can have adverse impacts on human rights;

(b) Not letting non-compliant enterprises go without consequences and thereby creating unfair burdens for enterprises that meet expectations: two key elements include the need for Governments to follow-up on any issues and for enterprises to suffer consequences for non-compliance;

(c) Approaches that are too rigid and prescriptive and fail to take into account that there is no one-size-fits-all formula;

(d) Regulatory incoherence across jurisdictions, since all legal developments aimed at promoting human rights due diligence should be aligned with the Guiding Principles. Pioneering Governments have an opportunity to play a leadership role in collective action and the coordination of efforts across jurisdictions to ensure that business enterprises meet unified expectations. Such coordination is also important in order to promote a level playing field for businesses falling under jurisdictions with higher standards for human rights due diligence and avoid "de-risking", where business enterprises avoid investing in high-risk contexts.

75. Efforts to promote better preventive approaches also need to be accompanied by legal developments to strengthen access to remedy through both judicial and non-judicial measures, such as through national contact points.[49] This could contribute to enhancing incentives to exercise proper human rights due diligence, as the costs to businesses for negative impacts on people would become clearer.

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[48] The European Coalition for Corporate Justice has proposed a set of key features of effective human rights due diligence legislation, see http://corporatejustice.org/news/6133-eccj-publishes-key-features-of-mandatory-human-rights-due-diligence-legislation?platform=hootsuite.

[49] See the Working Group report A/72/162 and the reports of the accountability and remedy project of OHCHR on enhancing effectiveness of both judicial and non-judicial mechanisms in cases of business-related human rights abuse, https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx. In the following reports, OHCHR highlights the need for human rights due diligence concepts to be properly integrated into relevant national law regimes: A/HRC/32/19, A/HRC/32/19/Corr.1 and A/HRC/32/19/Add.1. In a follow-up report (A/HRC/38/20/Add.2), OHCHR clarifies that it is possible to develop legal regimes in which the failure to carry out human rights due diligence may be the basis for a legal action without necessarily having to prove that harm resulted from the lack of due diligence.

76. When strengthening the connection between human rights due diligence and legal liability, there are a number of strategies that States could adopt. The Office of the United Nations High Commissioner for Human Rights (OHCHR) underlines in a report (A/HRC/38/20/Add.2) that efforts should be informed by clear policy aims and adopt a careful approach that creates incentives for business enterprises to exercise robust due diligence and strikes a balance "between legal certainty and providing businesses with flexibility in how they design their human rights due diligence processes". The report also highlights the need to build the capacity of judges to use human rights due diligence concepts more liberally and effectively in determinations of liability, such as in tort cases, which would provide a powerful incentive for companies to do human rights due diligence properly.

77. Business enterprises and associations have emphasized the limitations of developing human rights due diligence legislation.[50] These concerns are legitimate, but do not negate the imperative for Governments to take steps to close governance gaps, including through legal means. When considering the most effective approaches, States may learn from both legislative and enforcement efforts in other fields, such as anti-bribery and environmental protection (see Working Group report A/HRC/35/33), where business enterprises have been able to adjust to the implementation of laws concerning corporate responsibility expectations. Generally, business actors are not opposed to legislation when it helps to level the playing field and provides predictability.

78. While legislative advances need to be built upon and expanded, there are limits to what laws alone can achieve in the short term. Other approaches need to be pursued simultaneously.

Leveraging the role of the State as an economic actor

79. Guiding Principle 4 clarifies that States are expected to "take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State or that receive substantial support and services from State agencies, such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence".

80. The Working Group has taken stock of practice and ways forward in this area in previous reports. In its report on State-owned enterprises (A/HRC/32/45), the Working Group highlighted the good practices of some Governments and State-owned enterprises and called on State-owned enterprises to lead by example. Building on existing good practice models, Governments should require that State-owned enterprises conduct human rights due diligence in their own operations and require the same from business partners both at home and abroad. As part of such efforts, Governments should require systematic and meaningful reporting on environmental, social and governance factors that include human rights — building on progress made in environmental, social and governance and human rights reporting requirements that are already emerging across jurisdictions.

81. As highlighted in the Working Group's report submitted to the Human Rights Council at its the thirty-eighth session (A/HRC/38/48), States can also use economic incentives to drive the application of human rights due diligence. They should make government support for trade and investment, such as export credits, conditional on corporate respect for human rights. In addition to export credits, there is a range of additional services that States can provide to export-oriented companies, including

[50] See the submission by the International Organisation of Employers, https://www.ohchr.org/Documents/Issues/Business/WGSubmissions/2018/IOE.pdf.

participation in trade missions, trade advocacy, general guidance on exporting into foreign markets, embassy services in overseas markets and training and other resources. The Working Group identified emerging practices in this field, but stressed that much more needs to be done. The existing practice shows that it is an area where progress could be achieved in the short term if there is political will.

82. Guiding Principle 6 clarifies that States should also "promote respect for human rights by business enterprises with which they conduct commercial transactions", not least through their procurement activities. Given the scale of public procurement, it provides one of the most significant means for States to fulfil their duty to protect human rights in a business context by creating incentives to exercise human rights due diligence through the awarding of public contracts. In spite of slow progress overall and a need to undertake both legal reforms and strengthen policy coherence in general, good practices are emerging.[51]

83. States should come together and strengthen collaboration and convergence in this area. For example, in its 2016 recommendation on human rights and business, the Council of Europe recognized this need, calling on member States to promote human rights due diligence when States own or control business enterprises, grant substantial support and deliver services to or conduct commercial transactions with business enterprises. The recommendation also called on member States to "provide for adequate consequences if such respect for human rights is not honoured".[52]

Promoting policy coherence, guidance and collaborative approaches

84. Besides public law and administrative measures, there are a number of other policy levers that States should use. Key functions for State action to drive stronger uptake of human rights due diligence in business practice include:

(a) *Promoting policy coherence*. The lack of policy coherence between governmental departments and agencies that shape business practice and the human rights obligations of the State is a significant gap. A good starting point, however, is that this is increasingly being recognized by most Governments, including in the growing number of national action plans. Closing the gap in policy coherence should be a key issue in the implementation of existing action plans and for the next generation of such plans. Key points of action should be for Governments to lead by example on human rights due diligence and address issues identified in the present report for making progress on the uptake of human rights due diligence in wider business practices;

(b) *Providing guidance*. States should play a leading role in translating international due diligence guidance into the national language and providing guidance tailored to the local context. In an emerging market context, for example, the Government of China is backing several industry-focused initiatives to promote due diligence in supply chains. Governments and public bodies can also provide guidance for boards of directors on their human rights responsibilities.[53] In addition,

[51] See, for example, the International Learning Lab on Public Procurement and Human Rights, http://www.hrprocurementlab.org/. One example involving the use of sanctions is the procurement agency of Chile (ChileCompra), which bans companies from doing business with government entities if found to be engaged in anti-union practices: http://www.chilecompra.cl/category/centro-de-documentacion/normativa/proveedores-inhabilitados-para-contratar/.

[52] See https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html.

[53] One example is the guide of the Equality and Human Rights Commission of the United Kingdom containing five steps that boards should follow to satisfy themselves that their companies are managing human rights impacts: https://www.equalityhumanrights.com/sites/default/files/business_and_human_rights_web.pdf.

States need to play an active role in supporting the development of guidance for small and medium-sized enterprises on the human rights due diligence that they need to undertake;

(c) *Facilitating peer learning and multi-stakeholder platforms for human rights due diligence*. The processes in national action plans that involve relevant stakeholders, including affected communities and workers, human rights defenders, civil society organizations and business enterprises and associations, provide platforms for national dialogue on the business-related risks to human rights and ways to strengthen human rights due diligence in general. In order to facilitate awareness-raising and greater understanding of the human rights risks facing specific sectors, Governments should also support sector-focused platforms. For example, in the Netherlands, the Ministry of Foreign Affairs and the Ministry of Economic Affairs and Climate Policy have facilitated a process to engage Dutch business sectors in developing sector-based covenants to address "corporate social responsibility" risks involving internationally operating companies.[54] The covenants that have been signed by business enterprises to date, for example, for the garment and textile sector, banking sector, gold sector, food products sector and insurance sector, have been developed through multi-stakeholder dialogue between sector associations, member companies, the Government, trade unions and civil society organizations. While evaluation of the Dutch agreements is still pending, the overall approach is innovative and could be more widely explored. Key factors for success include benchmarking against the Guiding Principles, multi-stakeholder negotiations to help to build broad understanding of the Guiding Principles in practice, resources for capacity-building, mechanisms for monitoring and accountability and a stick-and-carrot approach to cover enterprises that are initially unaware of or unwilling to meet the corporate responsibility to respect. In order to address the latter aspect, Governments can play a stronger role in pushing national employer organizations and industry and sector associations to engage.

2. Investor leverage

85. Investors can play a significant role in driving wider uptake of human rights due diligence approaches by setting expectations and interacting with the boards and senior executives of the enterprises they invest in.

86. Increasingly, investors are asking questions about human rights policies and human rights due diligence in line with the Guiding Principles. This practice has moved beyond the niche realm of socially responsible investors to become part of a wider trend of greater focus on managing the social impact of business and integrating environmental, social and governance considerations into mainstream investment decision-making. It is increasingly being recognized that proper human rights due diligence and the integration of human rights risks improve risk management overall — and are good for both people and investments.

87. This is a welcome development, and the Working Group is encouraged by the efforts of initiatives such as the Investor Alliance for Human Rights, a collective action platform connecting institutional investors representing $2 trillion with tools and strategies to promote corporate respect for human rights.[55] The Working Group is also encouraged by the alignment of the Principles for Responsible Investment with the Guiding Principles, which are used in the former as a framework for engagement. For example, the Principles for Responsible Investment notes in a report that when extractive sector companies are engaged, "it is helpful to point towards good practice

[54] See https://www.imvoconvenanten.nl/?sc_lang=en.

[55] For an overview of how investors engage on human rights, see https://www.ohchr.org/Documents/Issues/Business/WGSubmissions/2018/InvestorAlliance.pdf.

in the areas of governance and embedding human rights, human rights risk assessment, stakeholder engagement and grievance mechanisms. All are increasingly becoming part of what constitutes common good practice in the extractive sector".[56]

88. The Principles for Responsible Investment and investors have also highlighted the Guiding Principles Reporting Framework as a useful tool for investors to better assess how well business enterprises understand and manage their human rights impacts.

89. An increasing number of investors rightly acknowledge that they have their own responsibility to respect human rights. Like any other business, investors may cause or contribute to adverse impacts and may be connected to a host of adverse human rights impacts through their investments in companies across industries or sectors and regions. The Guiding Principles clarify that investors, as part of their own human rights due diligence, should use their leverage to seek to prevent and mitigate potential and actual adverse impacts.

90. Initiatives to assist investors in assessing the human rights performance of companies[57] and integrating human rights assessments into the evaluations done by agencies that rate environmental, social and governance and sustainability factors, are helping to drive this trend. Going forward, the Working Group encourages further efforts to:

(a) Scale up the integration of human rights risk management and engagement as part of mainstream investment decision-making and environmental, social and governance assessments, building on the recent developments of integrating environmental risk management into investment practice, which has happened at a much greater speed;[58]

(b) Build on developments in increasing the environmental, social and governance requirements set by stock exchanges, which is happening across a number of jurisdictions, including in emerging markets,[59] to systematically integrate human rights due diligence as part of such requirements. The Sustainable Stock Exchanges Initiative can play a key role in such efforts;

(c) Involve investors and stock exchanges in national action plan processes;

(d) Systematically promote the Guiding Principles as the globally agreed standard to complement the OECD guidance on responsible business conduct for institutional investors;

(e) Promote coordination and common understanding among investors, rating agencies and environmental, social and governance researchers in order to develop more coherent approaches that: (a) enable a better understanding of how business enterprises are managing human rights impacts in practice, and (b) drive more effective due diligence rather than "tick box" approaches and formulaic answers;

(f) Promote the understanding among investors that the purpose of human rights risk management is to prevent and address risks to people — not risks to the investment.

[56] Principles for Responsible Investment, "Human rights and the extractive industry: why engage, who to engage, how to engage", 2018.

[57] See, for example, the Corporate Human Rights Benchmark and the Guiding Principles Reporting Framework.

[58] See https://www.unpri.org/academic-research/a-just-transition-integrating-the-social-dimension-into-climate-strategies/3202.article.

[59] See https://www.shiftproject.org/media/resources/docs/Shift_updatecorplawproject_2013.pdf.

91. Progress in this area should also be supported by efforts to develop better metrics and indicators for evaluating performance of human rights due diligence. The Working Group welcomes efforts under way to address this challenge, including:

(a) The work of the Global Reporting Initiative to align with the Guiding Principles, including the change in recent years of its definition of materiality to incorporate the concept of impacts and align it with the Principles. The Initiative has established a technical committee on human rights disclosure to explore further alignment, including how best to report on management approaches to due diligence. As the Initiative provides the most widely used non-financial reporting framework, this process holds great potential;

(b) Work to explore the close relationship between integrated reporting and reporting in line with the Guiding Principles;[60]

(c) A project by the non-profit organization Shift, in partnership with the Centre for Human Rights at the University of Pretoria, the Association of Southeast Asian Nations (ASEAN) CSR Network and the Polish Institute for Human Rights and Business, to develop better ways of using information, metrics and indicators to evaluate respect for human rights by businesses.[61]

V. Conclusions and recommendations

A. Conclusions

92. **Corporate human rights due diligence has become a norm of expected conduct for all business enterprises. A small group of early adopters are showing the way and good practices are building up. Considerable efforts are still needed, however, as the majority of business enterprises around the world remain unaware, unable or unwilling to implement human rights due diligence as required of them in order to meet their responsibility to respect human rights. The fundamental challenge going forward is to scale up the good practices that are emerging and address remaining gaps and challenges. That will require concerted efforts by all actors. Evidence of what constitute some of the strongest drivers for changing business practice beyond the pioneers suggests that investors and Governments have a key role to play. For Governments in particular, addressing and closing market and governance failures is an inherent part of their duties.**

B. Recommendations

93. **The Working Group recommends that States use all available levers to address market failures and governance gaps to advance corporate human rights due diligence as part of standard business practice, ensuring alignment with the Guiding Principles, including by:**

(a) **Using legislation to create incentives to exercise due diligence, including through mandatory requirements, while taking into account elements to drive effective implementation by businesses and promote level playing fields;**

(b) **Using their role as economic actors to advance human rights due diligence, including by integrating human rights due diligence into the**

[60] See https://www.ungpreporting.org/resources/the-ungp-reporting-framework-and-integrated-reporting/.

[61] See https://www.shiftproject.org/resources/collaborations/valuing-respect/.

operations of State-owned enterprises and agencies that promote trade and investment, and into public procurement;

(c) Promoting greater policy coherence within Governments, including by adopting or strengthening the implementation of national action plans on business and human rights;

(d) Providing guidance to business enterprises, including small and medium-sized enterprises, on human rights due diligence tailored to local contexts;

(e) Facilitating multi-stakeholder platforms to promote dialogue on business-related risks to human rights, ways to address them and to strengthen monitoring and accountability, including in a sector context.

94. **The Working Group recommends that business enterprises:**

(a) If they have already adopted human rights due diligence policies and processes based on the Guiding Principles, continue on the journey and seek to continuously enhance approaches by engaging with affected stakeholders, civil society organizations, human rights defenders and unions and by being transparent about the management of potential and actual impacts;

(b) If they have not yet implemented human rights due diligence approaches, just get started, including by assessing their potential and actual impacts on human rights, assessing where existing processes fall short and developing an action plan for putting in place human rights due diligence procedures for their own activities and value chains, in line with the Guiding Principles, including by learning from good practices emerging in their own industry and in other sectors;

(c) Consider collective leverage approaches, especially when faced with systemic human rights issues.

95. **The Working Group recommends that entities in the investment community implement human rights due diligence as part of their own responsibility under the Guiding Principles, more systematically require effective human rights due diligence by the companies they invest in and coordinate with other organizations and platforms to ensure alignment and meaningful engagement with companies.**